back room and sell them in the adjoining front room. In such cases if there is unity of ownership and if the back room and the front room are operated by the employer as a single store, the entire premises ordinarily will be considered to be a single establishment for purposes of the tests of the exemption, notwithstanding the fact that the two functions of making and selling the goods, are separated by a partition or a wall. (See H. Mgrs. St., 1949, p. 27.)

§ 779.305 Separate establishments on the same premises.

Although, as stated in the preceding section, two or more departments of a business may constitute a single establishment, two or more physically separated portions of a business though located on the same premises, and even under the same roof in some circumstances may constitute more than one establishment for purposes of exemptions. In order to effect such a result physical separation is a prerequisite. In addition, the physically separated portions of the business also must be engaged in operations which are functionally separated from each other. Since there is no such functional separation between activities of selling goods or services at retail, the Act recognizes that food service activities of such retail or service establishments as drugstores, department stores, and bowling alleys are not performed by a separate establishment which ''is'' a ''restaurant'' so as to qualify for the overtime exemption provided in section 13(b)(8) and accordingly provides a separate overtime exemption in section 13(b)(18) for employees employed by any ''retail or service establishments'' in such activities in order to equalize the application of the Act between restaurant establishments and retail or service establishments of other kinds which frequently compete with them for customers and labor. (See Sen. Rept. 1487, 89th Cong. first session, p. 32.) For retailing and other functionally unrelated activities performed on the same premises to be considered as performed in separate establishments, a distinct physical place of business engaged in each category of activities must be identifiable. The retail portion of the business must be distinct and separate from and unrelated to that portion of the business devoted to other activities. For example, a firm may engage in selling groceries at retail and at the same place of business be engaged in an unrelated activity, such as the incubation of chicks for sale to growers. The retail grocery portion of the business could be considered as a separate establishment for purposes of the exemption, if it is physically segregated from the hatchery and has separate employees and separate records. In other words, the retail portion of an establishment would be considered a separate establishment from the unrelated portion for the purpose of the exemption if (a) It is physically separated from the other activities; and (b) it is functionally operated as a separate unit having separate records, and separate bookkeeping; and (c) there is no interchange of employees between the units. The requirement that there be no interchange of employees between the units does not mean that an employee of one unit may not occasionally, when circumstances require it, render some help in the other units or that one employee of one unit may not be transferred to work in the other unit. The requirement has reference to the indiscriminate use of the employee in both units without regard to the segregated functions of such units.

§ 779.306 Leased departments not separate establishments.

It does not follow from the principles discussed in § 779.305 that leased departments engaged in the retail sale of goods or services in a departmentalized store are separate establishments. To the contrary, it is only in rare instances that such leased departments would be separate establishments for purposes of the exemptions. For example, take a situation where the departmentalized retail store, having leased departments, controls the space location, determines the type of goods that may be sold, determines the pricing policy, bills the customers, passes on customers' credit, receives payments due, handles complaints, determines the personnel policies, and performs

other functions as well. In such situations the leased department is an integral part of the retail store and considered to be such by the customers. It is clear that such departments are not separate establishments but rather a part of the retail store establishment and will be considered as such for purposes of the exemptions. The same result may follow in the case of leased departments engaged in the retail sale of goods or services in a departmentalized store where all or most of the departments are leased or otherwise individually owned, but which operate under one common trade name and hold themselves out to the public as one integrated business unit.

§ 779.307 Meaning and scope of "employed by" and "employee of."

Section 13(a)(2) as originally enacted in 1938 exempted any employee ''engaged in'' any retail or service establishment. The 1949 amendments to that section, however, as contained in section 13(a)(2) and (4) exempted any employee ''employed by'' any establishment described in those exemptions. The 1961 and 1966 amendments retained the ''employed by'' language of these exemptions. Thus, where it is found that any of those exemptions apply to an establishment owned or operated by the employer the employees ''employed by'' that establishment of the employer are exempt from the minimum wage and overtime provisions of the Act without regard to whether such employees perform their activities inside or outside the establishment. Thus, such employees as collectors, repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers, and delivery men actually employed by an exempt retail or service establishment are exempt from the minimum wage and overtime provisions of the Act although they may perform the work of the establishment away from the premises. As used in section 13 of the Act, the phrases ''employee of'' and ''employed by'' are synonymous.

§ 779.308 Employed within scope of exempt business.

In order to meet the requirement of actual employment ''by'' the establishment, an employee, whether performing his duties inside or outside the establishment, must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business. (See *Davis* v. *Goodman Lumber Co.,* 133 F. 2d 52 (CA–4) (holding section 13(a)(2) exemption inapplicable to employees working in manufacturing phase of employer's retail establishment); *Wessling* v. *Carroll Gas Co.,* 266 F. Supp. 795 (N.D. Iowa); *Oliveira* v. *Basteiro,* 18 WH Cases 668 (S.D. Texas). See also, *Northwest Airlines* v. *Jackson,* 185 F. 2d 74 (CA–8); *Walling* v. *Connecticut Co.,* 154 F. 2d 522 (CA–2) certiorari denied, 329 U.S. 667; and *Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391 (CA–6).)

§ 779.309 Employed "in" but not "by."

Since the exemptions by their terms apply to the employees ''employed by'' the exempt establishment, it follows that those exemptions will not extend to other employees who, although actually working in the establishment and even though employed by the same person who is the employer of all under section 3(d) of the Act, are not ''employed by'' the exempt establishment. Thus, traveling auditors, manufacturers' demonstrators, display-window arrangers, sales instructors, etc., who are not ''employed by'' an exempt establishment in which they work will not be exempt merely because they happen to be working in such an exempt establishment, whether or not they work for the same employer. (*Mitchell* v. *Kroger Co.,* 248 F. 2d 935 (CA–8).) For example, if the manufacturer sends one of his employees to demonstrate to the public in a customer's exempt retail establishment the products which he has manufactured, the employee will not be considered exempt under section 13(a)(2) since he is not employed by the retail establishment but by the manufacturer. The same would be true of an employee of the central offices of a chain-store organization who performs work for the central organization on the premises of an exempt retail outlet of the chain (*Mitchell* v. *Kroger Co.,* supra.)